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No. 09-314

In the Supreme Court of the United States

CITY OF VIRGINIA BEACH, VIRGINIA,

Petitioner,

v.

BRADLEY S. TANNER, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DANIEL R. ORTIZ
JAMES E. RYAN
University of Virginia School of Law
Supreme Court Litigation Clinic
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127

DAVID T. GOLDBERG
Donahue & Goldberg, LLP
99 Hudson Street, 8th Fl.
New York, NY 10013
(212) 334-8813

KEVIN E. MARTINGAYLE*
Stallings & Bischoff, P.C.
2101 Parks Avenue, Suite 801
Virginia Beach, VA 23451
(757) 422-4700

MARK T. STANCIL
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W., Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

QUESTION PRESENTED

Whether the Virginia Supreme Court correctly applied this Court's settled precedents in holding unconstitutional a provision of petitioner's (since-amended) municipal noise ordinance?

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

PROVISIONS INVOLVED

In addition to those cited in the petition, this case involves Article I, Sections 11 and 12 of the Virginia Constitution and the First Amendment to the United States Constitution. The text of each is set out in the Appendix.

Additionally, after the decision below, the City of Virginia Beach amended the relevant chapter of its City Code. Among the sections added is one that provides:

> No person shall permit, operate or cause any source of sound to create a sound level emanating from a restaurant during the hours between 11:00 p.m. and 7:00 a.m. (1) in excess of seventy-five (75) dB(A) when measured from any public area, including but not limited to adjacent streets or sidewalks; or (2) that is plainly audible and discernable at a distance of fifty (50) feet from any of the restaurant's external walls when measured from any property other than the property on which the restaurant is located.

Virginia Beach City Code § 23-72 (Adopted May 12, 2009).

STATEMENT

Petitioner, the City of Virginia Beach, Virginia, seeks review of the Virginia Supreme Court's unanimous decision holding unconstitutional a provision of the city's since-amended municipal noise control ordinance.

1. Virginia Beach City Code § 23-47 makes it a misdemeanor offense to "create or allow to be created" any "unreasonably loud, disturbing and unnecessary noise in the city * * *." The provision does not further define these operative terms; and though it identifies five "acts * * * declare[d]" to be "loud, disturbing and unnecessary noise in violation of this section," *ibid.*, it also announces that this enumeration does not exhaust its reach, *ibid.* See Pet. 4-5 (reproducing full ordinance).

By the ordinance's terms, this single standard governs at all times, in all parts of the city, and applies to all kinds of activity, including musical performances and commercial speech, see City Code § 23-47(5) (forbidding use of noise to "attract[] attention * * * to any * * * sale or display of merchandise"), as well as other noise-generating conduct.

2. Although the ordinance includes prohibitions keyed to incursions on "the comfort, quiet, or repose of reasonable persons" and "persons of reasonable

sensitivity," its language indicates these to be alternatives to – not limitations on – the encompassing general standard: It is unlawful to make "any unreasonably loud, disturbing and unnecessary noise in the city *or* any noise of such character, intensity and duration * * * to disturb or annoy the quiet, comfort or repose of reasonable persons," City Code § 23-47 (emphasis added). And even these standards do not limit the law's reach to activities that have precipitated *actual* complaints of disturbance.

3. Consistent with its broad language, the provision has been understood to authorize prosecution where an individual police officer determines that the noise from a particular activity is "unreasonably loud" or that it *would* "annoy the repose" of a – hypothetical – "reasonable person," even if no complaint was received.

In the months preceding the instant action, municipal police repeatedly cited respondents, who operated the Peppermint Beach Club, an entertainment venue located on the ground floor of a hotel in the city's commercial "oceanfront" section, Pet. App. 1a, despite the fact that the business had never generated a noise complaint, either to police authorities or to hotel management. *Id.* at 21a. At the same time, however, neighboring entertainment venues, which had generated large numbers of citizen noise complaints, were never cited. *Ibid.*

4. City officials were long aware of the problems of unpredictability and inconsistent enforcement the provision engendered. Before this suit, numerous enforcement actions had been dismissed by trial judges – although only after respondents and other defendants had been cited, prosecuted, and incurred substantial defense costs. See Pet. App. 52a-56a (Complaint ¶¶ 9-17).

5. In 2007, an official in the city's police department had taken it upon himself to formulate and publicize an alternative enforcement standard, under which citations could be issued when sound "definitively linked" to a particular establishment in the area was "plainly" audible "across the street." Pet. App. 5a.

This development generated still further uncertainty, raising questions about the new rule's geographic and substantive reach; the official's authority to formulate such rules; its relationship to the existing, codified language of the provision; and its constitutionality. These questions generated a variety of answers among individual police officers and courts adjudicating enforcement actions. See Pet. App. 21a.

6. In June 2007, respondents initiated this suit in state court, seeking, *inter alia*, a declaratory judgment that "Virginia Beach § 23-47 is violative of the Virginia Constitution, both facially and as

applied." Pet. App. 57a. The complaint referenced respondents' experience, as well as numerous trial court proceedings involving other parties, which highlighted the ordinance's uncertain reach and unpredictable enforcement. See *id.* at 52a-55a.

7. The trial court dismissed respondents' facial challenge without extensive analysis, citing another trial judge's 2003 disposition of a similar claim. Pet. App. 29a. The court heard evidence on their other claims, including testimony of city police officers, who (in the Virginia Supreme Court's words) "generally conceded" that the ordinance embodies a "standard that depends on an individual officer's assessment." Pet. App. 5a. The trial court specifically found that "Virginia Beach police officers possess wide discretion in determining whether music violates the ordinance"; that "the ordinance is not enforced the same throughout the city"; and that enforcement was "relaxed and possibly abandoned, in regards to outdoor entertainment," Pet. App. 21a. It found that even as respondents were repeatedly charged in the absence of any "specific complaints from citizens," no actions were brought against others, despite one witness's testimony "that he complained to the city over one-hundred times about outdoor music levels," *Ibid.* The court further found that the "across the street" standard had failed to cure the problems of unpredictable and subjective enforcement. *Ibid.*

Despite these findings and its conclusions that (1) respondents had "succeed[ed] in demonstrating that other persons similarly situated were not prosecuted," Pet. App. 22a, and (2) the record "unequivocally establishe[d] that the enforcement of the noise ordinance is selective and uneven," *id.* at 21a, the court declined to hold the ordinance unconstitutional, explaining that respondents had not proved "a discriminatory purpose." *id.* at 22a (citation and internal quotation marks omitted).

8. Respondents appealed to the Supreme Court of Virginia, which, in a unanimous decision, reversed, concluding that the ordinance was unconstitutionally vague.

The court explained that the "constitutional prohibition against vagueness * * * protects citizens from the arbitrary and discriminatory enforcement of laws," Pet. App. 8a, and that special concerns are implicated "when a vague statute implicates citizens' rights under the First Amendment," Pet. App. 9a.

The court also expressed its strong general reluctance to hold statutes unconstitutional, see Pet. App. 7a, and acknowledged that, given that legislators are "'[c]ondemned to the use of words,' courts cannot require 'mathematical certainty' in the drafting of legislation," *id.* at 8a (quoting *Grayned* v. *City of Rockford*, 408 U.S. 104, 110 (1972)).

Addressing the city's noise control ordinance, the court concluded that its "provisions do not contain ascertainable standards," and "fail to give 'fair notice' to citizens." Pet. App. 9a. The "reach of [the ordinance's] general descriptive terms" the court explained, "depends in each case on the subjective tolerances, perceptions, and sensibilities of the listener" – *i.e.*, the police officer. Pet. App. 10a. The court further explained that the references to "reasonable persons" and "persons of reasonable sensitivity" did not cure these problems, because "considered in their context," these terms continued to "delegate to a police officer the subjective determination * * * whether persons the police officer considers to be reasonable would be disturbed or annoyed." *Ibid.* This delegation "invite[s] arbitrary enforcement," the court continued, because individual officers invariably will "have differing perceptions regarding what levels of sound" are unreasonable or impermissible. *Ibid.*

Because the Virginia Supreme Court held the ordinance invalid on its face, it did not reach respondents' alternative claims that it also violated the Virginia Constitution, as applied. Pet. App. 12a.[1]

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[1] Neither in the court below nor in this one has petitioner sought to overturn the trial court's findings, which include "that the enforcement of the noise ordinance is selective and uneven," that respondents had been treated differently from others "similarly situated," Pet. App. 21a, and that no citizen noise complaint against them had been identified, *ibid.*

9. Petitioner did not ask the Virginia Supreme Court to stay its decision; nor did it undertake to redraft the provision the court had held unconstitutional. The city instead enacted an entirely new noise control ordinance, which it codified alongside the one held invalid.

The new law, modeled on measures in effect in a number of other Virginia municipalities, prescribes separate standards (stated largely in decibel levels) for daytime and nighttime noise, see City Code § 23-69(a),(b); for noise heard in multifamily dwellings, *id.* § 23-69(c); for motor vehicle noise (including separate standards for motorcycles and cars and for zones where the speed limit is above or below 35 miles per hour), *id.* § 23-70; for activities in "noise-sensitive areas," *id.* § 23-71(e); and sound generated by particular construction equipment, *id.* § 23-71(f). Particularly relevant here, the new ordinance provides:

> No person shall permit, operate or cause any source of sound to create a sound level emanating from a restaurant during the hours between 11:00 p.m. and 7:00 a.m. (1) in excess of seventy-five (75) dB(A) [decibels] when measured from any public area, including but not limited to adjacent streets or sidewalks; or (2) that is plainly audible and discernable at a distance of fifty (50) feet from any of the restaurant's external walls when measured

> from any property other than the property on which the restaurant is located.

Id. § 23-72; see also *id.* § 23-64 (defining "restaurant" to include, *inter alia*, "bars [and] lounges"); *id.* § 23-68 ("In order to implement and enforce this article effectively, the chief of police shall promulgate standards and procedures for using and testing sound level meters used in the enforcement of this article.").

REASONS FOR DENYING THE WRIT

The decision below does not warrant review by this Court. In holding the local ordinance unconstitutionally vague, the Virginia Supreme Court correctly applied settled constitutional principles to the circumstances of the particular ordinance before it. The court did not, as petitioner claims, announce a broad rule that particular words or phrases are constitutionally deficient per se. Rather, as have this Court's decisions both sustaining and invalidating laws on vagueness grounds, the court carefully considered the language, structure, context, and administrative construction of petitioner's ordinance.

Petitioner's attempt to depict a "conflict" among lower courts suffers from the same basic defect: The different outcomes in the cases petitioner collects are the natural result of consistent application of the context-sensitive constitutional standard. Like the

Virginia Supreme Court's decision below, those cases do not rest on a controversial or disputed understanding of any important, generally applicable principle of constitutional law.

But even if there were any genuine reason for the Court to revisit the issue of the constitutional standards applicable to municipal noise ordinances, this case would be an exceedingly poor one in which to do so. The ordinance at issue is highly unusual, both in authorizing enforcement in the absence of any actual complaint and in operating simultaneously with a second, competing standard not mentioned in the city's code. And it has been the subject of specific and unchallenged factual findings of arbitrary and selective enforcement (giving rise to additional constitutional claims that were presented to, but not decided by, the court below). What is more, petitioner's enactment, during the pendency of this litigation, of a new and comprehensive ordinance addressing the same subject matter would give rise to further questions of state and federal law that this Court would be ill-positioned to resolve in the first instance.

I. The Virginia Supreme Court Correctly Applied Settled Principles of Constitutional Law To The Particular Ordinance Before It

The decision below does not raise any important or unsettled question of constitutional law. In

holding petitioner's ordinance unconstitutional, the unanimous Virginia Supreme Court applied the well-settled test for unconstitutional vagueness – the very same standard cited in the petition and applied in the decisions petitioner insists are in "conflict."

The court below correctly identified the purpose of the vagueness doctrine: to assure that laws define offenses with sufficient clarity to provide fair notice and limit arbitrary police enforcement. See *Kolender* v. *Lawson*, 461 U.S. 352, 357-358 (1983); see also *City of Chicago* v. *Morales*, 527 U.S. 41, 56 (1999) (Opinion of Stevens, J.) (describing lack of fair notice and susceptibility to arbitrary enforcement as "two independent reasons" for invalidation). The court properly recognized that clarity is especially important when a law "implicates citizens' rights under the First Amendment." Pet. App. 9a; see *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *Ward* v. *Rock Against Racism*, 491 U.S. 781, 790 (1989) ("Music, as a form of expression and communication, is protected under the First Amendment."). Further, the court noted that "context" is critical in determining vagueness claims, as is the administrative construction a law has been given. See *Grayned*, 408 U.S. at 110; cf. *Deegan* v. *City of Ithaca*, 444 F.3d 135, 146 (2d Cir. 2006) (noting that an "unpredictable construction and application of [an] ordinance," can "deprive[] [a citizen] of his right to understand what conduct violate[s] a law").

Consistently with this Court's precedents, the decision expressly acknowledged that, in view of the inherent imprecision of language, neither "'mathematical certainty'" nor "meticulous specificity" is required to withstand constitutional scrutiny. Pet. App. 8a (quoting *Grayned*, 408 U.S. at 110). Rather, the Constitution requires only that "the ordinance as a whole makes clear what is prohibited." *Ibid.*

Petitioner largely seeks to overturn the Virginia Supreme Court's application of these established principles of law to the particular case before it. Such claims seldom warrant exercise of this Court's discretionary jurisdiction, see, *e.g.*, *Powell* v. *Nevada*, 511 U.S. 79, 87-88 (1994) (Thomas, J., dissenting), especially where, as here, the case arises from a state supreme court's construction of its own law. See *Morales*, 527 U.S. at 61 (this Court has "no power to construe the language of a state statute more narrowly than the construction given by that state's highest court"); accord *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 838 & n.9 (1978).

In any event, however, the Virginia Supreme Court correctly applied the law to the facts of the case. The court recognized that the challenged ordinance, as written and construed, both fails to give adequate notice and authorizes arbitrary enforcement. The law, by its terms, subjects a vast range of disparate activity, carried out at different

times and in different types of areas, to a single, vaguely-worded standard, which it does not further define. And the ordinance empowers individual officers to issue citations whenever they believe sound "*would*" have an unwelcome effect on a (hypothesized) "reasonable person" – irrespective of any actual complaints. See Pet. App. 10a (emphasis added). Such a standard is inherently "subjective," *id.* at 11a, effectively "entrust[ing] lawmaking 'to the moment-to-moment judgment of the policeman on his beat,'" *Kolender*, 461 U.S. at 360 (quoting *Smith* v. *Goguen*, 415 U.S. 566, 575 (1975)); cf. *Saia* v. *New York*, 334 U.S. 558, 560-561 (1948) (striking down police permission requirement on ground that it placed "'[t]he right to be heard * * * in the uncontrolled discretion of the Chief of Police").

As the court also properly recognized, these constitutional problems were aggravated by petitioner's employment of "two enforcement standards in evaluating noise emanating from oceanfront business establishments." Pet. App. 4a. A person endeavoring to understand the general language of § 23-47 would be surprised to learn that every sound that was "audible from across the street" was "unreasonably loud," let alone that this distinct, stringent standard would apply only in a commercial district, not a residential one, and even within the commercial area, would not be applied uniformly. Indeed, as the Second Circuit held, in strikingly similar circumstances involving a generally-worded

noise ordinance that had been given an "unpredictable construction" by local officials, such overlapping and incompatible standards can deprive citizens of proper notice. See *Deegan*, 444 F.3d at 146.

And "actual experience with the ordinance," *Reeves* v. *McConn* 631 F.2d 377, 386 (5th Cir. 1980), has shown that concerns regarding the vagueness – not to mention vagaries – of this regime were well-founded. The Virginia Beach Circuit Court found that "the evidence 'unequivocally establishe[d] that the enforcement of the noise ordinance is selective and uneven,'" Pet. App. 21a, with others "similarly situated," *id.* at 22a, to respondents being treated entirely differently.[2]

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[2] Although the decision invalidated petitioner's ordinance on vagueness grounds alone, without reaching respondents' other constitutional claims, these findings would raise further, insuperable barriers to upholding the ordinance. Even outside the First Amendment context, this Court has held that the Constitution forbids government from "intentionally treat[ing individuals] differently from others similarly situated" without "rational basis." *Village of Willowbrook* v. *Olech*, 528 U.S. 562, 564 (2000). In First Amendment cases, the Court has been especially reluctant to uphold restrictions when the otherwise legitimate governmental interests asserted are pursued erratically. See, *e.g.*, *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 418 (1993) (noting that newsracks removed under challenged policy were "no more harmful," from an esthetic and safety perspective than those permitted to remain); *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 488-489 (1995).

Petitioner's claim of "jurisprudentially significan[t]" error, Pet. 2, rests on a misreading of both the Virginia Supreme Court's decision and this Court's governing precedents. The decision below did not purport to require any particular approach to noise control. But see Pet. 2 (asserting that court held a statute "must contain mathematically precise standards such as decibel ranges"); *id.* at 11 (similar). Nor did it hold any word or phrase unconstitutionally vague *per se* in every (or any other) statutory setting. But see Pet. 12 (accusing that court of "reject[ing] * * * the 'reasonable person' standard"). On the contrary, it held this particular ordinance "as a whole" failed to meet the constitutional minimum standard, giving due weight to context, administrative construction, and principles of restraint counseling against unnecessary invalidation. See Pet. App. 7a-8a.

That approach is not a departure from this Court's jurisprudence, but a faithful restatement of it. This Court's cases do not purport to pronounce words vague (or definite) in isolation, but instead highlight the importance of context – both semantic and substantive. See *United States* v. *Williams*, 128 S. Ct. 1830, 1846 (2008) (explaining that vagueness precedents have invalidated laws that "tied criminal culpability" to conduct described with reference to "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings"); *FDA* v. *Brown & Williamson Tobacco*

Corp., 529 U.S. 120, 132 (2000) ("[T]he meaning – or ambiguity – of certain words or phrases may only become evident when placed in context."). As the Court emphasized in *Hoffman Estates*, vagueness standards "should not * * * be mechanically applied." Rather, "the degree of vagueness that the Constitution tolerates – as well as the relative importance of fair notice and fair enforcement – depend * * * on the nature of the enactment," with "more stringent vagueness test[s]" applying to laws that affect First Amendment rights and authorize criminal penalties. 455 U.S. at 498-499 (footnotes omitted); see also *Kolender*, 461 U.S. at 357-358 (identifying "the requirement that a legislature establish minimal guidelines to govern law enforcement" as "the more important aspect of vagueness doctrine").

Thus, *Grayned* emphasized the narrowly limited reach of the ordinance upheld, underscoring that it was not "a vague, general 'breach of the peace' ordinance, but a statute written specifically for the school context, where the prohibited disturbances are easily measured by their impact on the normal activities of school," 408 U.S. at 112. Moreover, the measure sustained contained a demanding *scienter* requirement, which limited prosecution to those "'*willfully* mak[ing]'" disruptive noise around public schools, *id.* at 113-114 n.24 (quoting jury verdict). Here, in contrast, the operative terms of the prohibition are "vague [and] general"; it applies to all

sound in every part of the city; it may be enforced (and is) without any showing of "impact" on school (or any other) activity, let alone an "easily measured" one; and its violation does not depend on any showing of *scienter*.

Nor do any of the other decisions petitioner points to "stand in stark contrast," Pet. 12, to the one here. Like the one below, this Court's decision in *Coates* v. *Cincinnati*, 402 U.S. 611, 613 (1971) (Pet. 12) *invalidated* a statute on vagueness grounds, and *Cameron* v. *Johnson*, 390 U.S. 611 (1968), upheld a measure that was carefully circumscribed: Although the Court in that case turned aside a vagueness challenge keyed to the word "reasonably," it did so because the challenged law was "'precise and narrowly drawn'" and "'evince[ed] a legislative judgment that certain specific conduct'" – "'picketing * * * in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any * * * county * * * courthouses'" – should be proscribed. In that narrow context, the Court explained, "juxtaposed with 'obstruct' and 'interfere,'" the word "unreasonably" did not raise substantial vagueness concerns. See 390 U.S. at 617-618 (quoting *Edwards* v. *South Carolina*, 372 U.S. 229, 236 (1967), and ordinance). Nor did "*the Court* in *Kovacs* [v. *Cooper*, 336 U.S. 77, 78 (1949)] address[] whether the terms 'raucous' and 'loud' were so vague as to be unenforceable," Pet. 15 (emphasis added). Rather, in that splintered decision (which antedates

the development of much of this Court's modern First Amendment and vagueness jurisprudence), only three Justices addressed the permissibility of a prohibition on "loud and raucous" sound trucks. A majority of the Court understood "the issue presented" in that case to be quite different: "whether a state * * * may forbid all use of sound trucks * * * in public streets, [*i.e.*,] without reference to whether 'loud and raucous noises' are emitted," 336 U.S. at 105 (Rutledge, J., dissenting).[3]

Nor is there merit to petitioner's claims that this Court's cases hold that inclusion of the word "reasonable" establishes a law's validity per se – or, more fancifully, that the Virginia Supreme Court's invalidation of this ordinance somehow "conflicts with" Fourth Amendment or qualified immunity jurisprudence. See Pet. 12-14. The former contention is refuted by the decision in *Kolender*, which voided for vagueness a law that required an individual to provide "credible and reliable" identification to a

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[3] Even on its own terms, petitioner's argument misses the point: Justice Reed's opinion did not conclude that any particular "*term*[]" could be "enforce[d]" in every law in which it appeared, see Pet. 15 (emphasis added) – only that a law prohibiting sound trucks from making "loud and raucous" noise when driving through residential neighborhoods was sufficiently definite to pass constitutional muster. Even were it the holding of the Court, that would not settle that every ordinance including the phrase "unreasonably loud" is immune from challenge – especially one with the distinctive, problematic features identified by the court below.

police officer when requested – notwithstanding that that phrase had been interpreted to mean "carrying *reasonable* assurance [of] * * * authentic[ity]." See 461 U.S. at 361 (emphasis added); cf. *Morales*, 527 U.S. at 62 (acknowledging that the "requirement that the officer reasonably believe that a group of loiterers contains a gang member does place a limit on [his] authority," but holding that standard insufficient, in context).

The Virginia Supreme Court had no difficulty appreciating the error of petitioner's more far-flung analogies. Although it operates in the "criminal law setting[]," Pet. 14, the Fourth Amendment's requirement that searches and seizures be "reasonable" is a limitation on government, not a standard for imposing individual liability, and the qualified immunity standard does not determine criminal liability, see 18 U.S.C. § 242; *Hoffman*, 455 U.S. at 498-499. In that setting, "reasonable[ness]" affords added protection – in the form of an immunity from trial, see *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985) – to individuals whose conduct *violates the Constitution*. Respondents here, in contrast, were engaged in constitutionally *protected* activity and were required repeatedly to endure trials before being vindicated. Cf. *Saia*, 334 U.S. at 560-561 (invalidating permission requirement, for placing police officer "athwart the channels of communication as an obstruction which can be removed only after criminal trial and conviction and lengthy appeal");

City of Lakewood v. *Plain Dealer Pub. Co*, 486 U.S. 750, 757 (1988) (noting that "the mere existence of the licensor's unfettered discretion" may induce self-censorship).

Of course, the Virginia Supreme Court did not hold or even intimate that terms like "unreasonable" and "reasonable person" are inherently vague or constitutionally irrelevant. It held merely that, in the particular context presented, those terms were insufficient.

II. There Is No Conflict Among The Lower Courts

The decision of the Virginia Supreme Court does not signal any conflict, "dangerous," Pet. 18 or otherwise, among lower courts. No other decision has sustained (or invalidated) this ordinance, of which the Virginia Supreme Court is the authoritative expositor. While petitioner labors to collect (and quote at length) seemingly every appellate case in which a noise regulation has been sustained against vagueness challenge – especially those which include some form of the word "reasonable" – its claim of "conflict" depends on disregarding multiple, constitutionally critical differences. Most important, none of the cases on petitioner's roll call either upheld a law a state court had authoritatively construed to impose a subjective standard or gave any indication that it would so hold. See Pet. App. 11a ("[the] determinations required by [petitioner's] ordinance

can only be made by police officers on a subjective basis"). Nor does the Virginia Supreme Court's decision suggest that another ordinance, embodying a more genuinely objective standard, would be unconstitutional. And in none of the lower court cases cited in the petition did the proponent of the ordinance adopt a dueling, second standard.

There is no conflict between the decision here and those of the Second or Fifth Circuits, which are the only federal appellate courts the petition cites, see Pet. 18-20. *Reeves* v. *McConn* 631 F.2d 377 (5th Cir. 1980), decided nearly three decades ago, actually held *un*constitutional the central provision of the law at issue. See *id.* at 388. Although, as the petition notes, that decision declined to hold invalid a provision prohibiting noise "disturbing * * * to persons within the area of audibility," the Fifth Circuit's rationale is worth recording: "If *actual experience* with the ordinance were to demonstrate that it represents a subjective standard * * * we would not hesitate to change our judgment." *Id.* at 386 (emphasis added). Here, of course, not only is there "unequivocal," evidence, Pet. App. 21a, of exactly such "experience" but there is also a definitive conclusion, by the court with final authority on the matter, that petitioner's ordinance depends on a subjective standard.

Nor is there any conflict between the Virginia Supreme Court and the Second Circuit. As explained above, this case if litigated in that jurisdiction would

have been controlled by *Deegan*, in which the Second Circuit sustained a vagueness claim precisely because, as here, the noise ordinance was being enforced according to a police-formulated standard neither suggested nor authorized by the generally-worded local statute. 444 F.3d at 145-146. Nor does the decision petitioner does cite, *Howard Opera House Assocs.* v. *Urban Outfitters, Inc.*, 322 F.3d 125 (2d Cir. 2003), conflict either. In *Howard*, there was no claim that the law at issue was being enforced – or lawfully could be – in the absence of actual disturbance or complaint. On the contrary, the terms of the ordinance required "disturb[ance] of the peace or health of another," and the case arose out of multiple complaints by a law firm concerning loud music emanating from a store located in the same office building. See 322 F.3d at 128. If anything, these two rulings highlight the degree to which cases of this kind are – properly – determined by the particulars of the ordinances and the circumstances surrounding their enforcement.

Petitioner's claim of conflict with state cases (Pet. 20-27) fares no better. To the extent the petition relies on decisions of intermediate courts, this Court generally does not sit to resolve such "conflicts," see Sup. Ct. R. 10; E. Gressman, *et al., Supreme Court Practice* (9th ed. 2007) at 225.[4] And the absence of

[4] See *id.* (citing *Earley v. State*, 789 P.2d 374 (Alaska Ct. App. 1990); *Harlem Yacht Club* v. *New York City Env'l Control Bd.*, 40 A.D.3d 331 (N.Y. App. Div. 2007); *Lutz* v. *City of*

subsequent decisions from the high courts of these States belies any claim that there is a pressing conflict warranting this Court's attention.

As for state high court decisions, a number of the cases featuring prominently in petitioner's catalogue of ostensibly "similar" cases involved measures that included a specific intent limitation, which is entirely lacking here. See, *e.g.*, *Eanes* v. *State*, 569 A.2d 604, 607 (Md. 1990) ("willfully"); *City of Beaufort* v. *Baker*, 432 S.E.2d 470, 472 (S.C. 1993) ("willfully"); *Earley*, 789 P.2d at 375 (requiring "intent" or "reckless disregard"); *State* v. *Johnson*, 542 P.2d 808, 809 (Ariz. 1975) ("maliciously and willfully"). And others involved laws with detailed standards and narrowly drawn, context-specific prohibitions, which would significantly check enforcement discretion. See, *e.g.*, *Town of Baldwin* v. *Carter*, 294 A.2d 62, 65 (Me. 2002) (animal noise ordinance that specified the type of "significant and ongoing" dog noise prohibited); see also *Indiana-Kentucky Elec.* v. *Comm'r Ind. Dept. Env'l Aff.*, 820 N.E.2d 771 (Ind. App. 2005) (upholding portions of noise ordinance that included specific and detailed standards).

Indianapolis, 820 N.E.2d 766 (Ind. Ct. App. 2005); *People* v. *Lord*, 796 N.Y.S.2d 511 (N.Y. App. Div. 2005); *State* v. *Friedman*, 697 A.2d 947 (N.J. Super. Ct. App. Div. 1997); and *Township of Plymouth* v. *Hancock*, 600 N.W.2d 380 (Mich. Ct. App. 1999)).

The few cases that actually address a "reasonable person" standard employ that standard in a fundamentally different way than did petitioner here – to provide additional protection when there is *already* another person (usually many persons) disturbed by the defendant's activity. For example, in *Eanes* (cited Pet. 21), the Maryland Court of Appeals upheld a noise ordinance (which included a "willful[ness]" requirement, see *supra*) enforced against an anti-abortion protestor whose loud speech had resulted in "numerous" complaints, expressly because the protestor's noise was "actually disruptive to the 'captive' audience in the neighborhood." 569 A.2d at 617. Similarly *Baker*, which also included a "willful" limitation, 432 S.E.2d at 472, upheld an ordinance applied to sound so loud that nearby merchants had been rendered "unable to conduct business," *id.* at 473. In these situations, the "reasonable person" standard acts to shield a potential defendant from the complaints of a "hypersensitive listener." The power claimed here is fundamentally different: A police officer is authorized to issue citations without any actual disturbance or third party complaint, based on his belief that a *hypothetical* reasonable person "would be" annoyed.

There is *no* objective external indicator here, such as proximity to a hospital, school, or residential neighborhood that would tell a reasonable person when he was at risk of prosecution for "unreasonably loud * * * and unnecessary" sounds. Indeed, the only

such indicators available – that no member of the public (including hotel guests) in fact complained about sound from respondents' business and that others in the same area made louder sound without being cited – would lead a person in respondents' position reasonably to conclude he was within the bounds of the law.[5]

Finally, petitioner (Pet. 27-29) misguidedly faults the Virginia Supreme Court for relying on *Thelen* v. *State*, 526 S.E.2d 60 (Ga. 2000), and *People* v. *New York Trap Rock Corp.*, 442 N.E.2d 1222 (N.Y. 1982). Pet. 27-29, emphasizing that these decisions involved laws lacking "reasonable person" limitations. But it is not at all clear that Virginia Beach's noise ordinance includes a "reasonable person" limitation; § 23-47 prohibits noise that *either* is "unreasonabl[y] * * * loud *or* * * * disturbs a reasonable person." *Id.* (emphasis supplied). And it is readily apparent that disturbance of an *actual* (reasonable) person is not required. As the courts below found, Virginia Beach enforced the ordinance repeatedly against

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[5] Although petitioner notes that respondents were given "warnings," (Pet. 7), *Morales* held that warnings are insufficient absent constitutionally sufficient standards. See 527 U.S. at 58-59. Nor, in this case, does the presence of enumerated (but non-exhaustive) prohibitions buttress the ordinance. None of these provides any check on selective enforcement, and, as written, a number raise additional First Amendment difficulties. See, *e.g.*, City Code § 23-47(5) (prohibiting "use of any * * * instrument or device for the purpose of attracting attention, by creation of noise, to any * * * sale or display of merchandise").

respondents without ever receiving a complaint. To the extent those decisions held, as petitioner says, that disturbance by itself is constitutionally *insufficient*, neither *Trap Rock* nor *Thelen* comes close to suggesting that actual disturbance is *unimportant*. Rather, both cases arose from multiple serious complaints. See *Thelen*, 526 S.E.2d at 61 (operating a helicopter); *Trap Rock*, 442 N.E.2d at 1223 (operating a stone quarry at night). As the Virginia Supreme Court recognized, the ordinance here at most substitutes a different form of "subjective determination"-based enforcement for the sort held impermissible in those cases.

III. The Decision Below Is Particularly Unsuited For Further Review

The issue actually decided below – that one jurisdiction's ordinance failed to satisfy the constitutional vagueness test established by this Court's precedents – is of no broad importance. Moreover, that decision was rendered by the court with the final say on the construction of the local law, see *Morales*, in a case brought under the Virginia Constitution, over which it also has the last word, cf. *Brigham City* v. *Stuart*, 547 U.S. 398, 409 (2006) (Stevens, J., concurring).

Even within the single jurisdiction of Virginia Beach, the decision has less practical significance than petitioner might claim. If petitioner were able

to persuade this Court that the Virginia Supreme Court erred, the city would find itself facing significant additional constitutional hurdles before it could enforce the ordinance. The city would have to show that it satisfies other First Amendment requirements and is constitutional as applied, despite undisturbed and unchallenged findings that enforcement was "selective"; that "similarly situated" businesses were treated differently; and that those generating more complaints were left alone entirely. Pet. App. 21a-22a.

And as noted above (but not in the petition), the city has enacted a new law that "establishes" a detailed and comprehensive "noise control program," City Code § 23-65. It is far from clear that the city would, in fact, attempt to enforce the old ordinance if it were now allowed to; but the city's adoption of this highly specific, decibel-based system, would also bear on whether it *could* do so, by casting a shadow on any claim by petitioner that the problem-riddled approach reflected in its older provision is in fact "necessary to achieve the government's interest," *Ward*, 491 U.S. at 798–800.

For these and other reasons, this case would be an entirely inappropriate vehicle for revisiting constitutional standards for noise ordinances, even were the Court persuaded that there is any real need to do so. As has been shown above, whether there is such a thing as a "typical" municipal noise control

ordinance, this one, which authorizes prosecution based entirely on a police officer's belief that a reasonable person "would be" disturbed – and which has given rise to two enforcement standards, is surely *a*typical. The detailed state court findings of selective and arbitrary enforcement, the fact that the suit was litigated below on state law grounds; and that the decision petitioner seeks to have reviewed only reached one of several alternative grounds that would support invalidation all take this case still further out of the mainstream, cf. *Bd. of Trustees* v. *Fox*, 492 U.S. 469, 483-85 (1989) (noting "the usual judicial practice" of deciding as-applied challenges first). And as just noted, resolving petitioner's claims would likely entail answering the sort of questions, relating to petitioner's freshly-enacted standard, that are especially unsuited for resolution in the first instance by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DANIEL R. ORTIZ
JAMES E. RYAN
University of Virginia School of Law
Supreme Court Litigation Clinic
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127

DAVID T. GOLDBERG
Donahue & Goldberg, LLP
99 Hudson Street, 8th Fl.
New York, NY 10013
(212) 334-8813

KEVIN E. MARTINGAYLE*
Stallings & Bischoff, P.C.
2101 Parks Avenue, Suite 801
Virginia Beach, VA 23451
(757) 422-4700

MARK T. STANCIL
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W., Suite 411
Washington, DC 20006
(202) 775-4500

** Counsel of Record*

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APPENDIX

U.S. Const. Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Va. Const. Art. I, § 11, Due process of law; obligation of contracts; taking of private property; prohibited discrimination; jury trial in civil cases.

That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts, nor any law whereby private property shall be taken or damaged for public uses, without just compensation, the term "public uses" to be defined by the General Assembly; and that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination.

That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred. The General Assembly may limit the number of jurors for civil cases in courts of record to not less than five.

Va. Const. Art. I, § 12, Freedom of speech and of the press; right peaceably to assemble, and to petition.

That the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that the General Assembly shall not pass any law abridging the freedom of speech or of the press, nor the right of the people peaceably to assemble, and to petition the government for the redress of grievances.